


VS: Revised text on RR art 82 and 26

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13:15

Emne	VS: Revised text on RR art 82 and 26
Fra	Erik Røsæg
Til	'nifs-rr@jus.uio.no'
Sendt	21. juli 2011 13:15
Vedlegg	 8226eng

Dear Correspondents,

This is a slightly modified version of the text I distributed last week.

Best regards,
Erik

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Sendt: 13. juli 2011 21:56
Til: 'nifs-rr@jus.uio.no'
Emne: Revised text on RR art 82 and 26

Dear Correspondents,

Thanks for all comments this far in the Correspondence Group on the implementation of the Rotterdam Rules.

Please find enclosed a revised approach to articles 82 and 26 of the Rotterdam Rules developed for the Danish and Norwegian Maritime Law Commissions. Comments and advice are most welcome.

Best regards,
Erik

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**A DRAFT REVISED COMPROMISE
ON THE RELATION BETWEEN THE ROTTERAM RULES (RR) AND OTHER TRANSPORT CONVENTIONS**

developed at a meeting of the chairpersons and secretaries of the Danish and Norwegian Maritime Law Commissions in Oslo 12 July 2011

The RR apply to contracts for carriage by sea ("pure" carriage by sea) and contracts for the carriage of goods that, in addition to the carriage by sea, are carried by another mode of transport ("maritime plus" –transports), eg, a transport from a port in State A to a port in State B and further on to a receiver in State C by truck. This follows from art 1(1).

The application of the RR is conditional on the existence of a contract of carriage of this kind, cfr. art 1(1), and that this contract fulfills the criteria in art 5 on connection to more than one State. But the State Parties can elect to apply the Convention also outside the scope defined by art 5. The Maritime Law Commissions of Denmark and Norway propose that the Rules shall apply also in respect of domestic transports.

The Convention does not deal with logistics contracts, ie contracts that both include an element of transport and eg storage, finishing operations, etc. Whether the Convention should be applied to the transport part of a logistics contract may depend on whether the transport part of it is of substantial importance and whether it can be separated from the remainder of the contract.

When the Convention is applied pursuant to the above, a conflict with other Conventions may occur. One example is the CMR, the road transport Convention. If the goods are carried on a truck, on a ferry and then on a truck again, it may be that both Conventions are applicable.

The detailed delimitation of the scope of the different Conventions is difficult. The recommendation of the Maritime Law Commission is that the starting point should be the agreement between the commercial parties or what they should be considered to have agreed. As long as one considers an election amongst different mandatory systems of liability, this is justifiable.

There are several considerations that can provide guidance in respect of what the parties have agreed on concerning the election amongst different mandatory systems of liability. They may have made an election in clear words or elected a specific way of performance. They may have agreed or have a common understanding that a particular kind of transport documents should be used. The use of a bill of lading is [in Europe] a clear indication that the maritime rules are applicable, at least when the document is not a freight forwarder's bill of lading in a typical trucking environment. Furthermore, the former dealing between the parties can provide guidance, and also how such transports usually are performed or how this particular transport was planned and performed. Altogether, there is a number of different considerations to take into account when clarifying the overall picture of which transport regime is elected.

Exceptionally, it may happen that the RR or another Convention does not allow the parties to agree on a different regime. This is, eg, so in respect of the core scope of the RR, international carriage by sea with connecting road transport. In the same way, CMR does not allow that one elects not to apply its rules when a truck is carried at an international ferry (without removing the goods from the truck) between two land transport legs. In such cases, the respective Conventions must be applied.

However, the Commission recommends – in line with newer European cases¹ that the Conventions are construed relatively narrowly, so that the scope of the election of the parties becomes wide.

When the parties to a large extent can elect the applicable liability regime, this does not mean that there is complete freedom of contract. They must elect one or the other of the mandatory systems. Also, the parties do not have to frame a transport agreement so that none of the mandatory systems are applicable, if there is one.

Exceptionally, it may happen that more than one Convention with mandatory rules as a starting point applies to the same transport. Article 82 of the RR addresses the situations of this kind that are practical in respect of the RR if all Conventions are narrowly construed. The Commission considers that RR art 82 removes whatever there may be of conflicts between the RR and other transport Conventions.

The technique of art 82 is that it provides for an exception from the RR if Conventions on carriage by air, road, rail or inland waterways expressly applies to transports that also go by sea. The relevant clauses of these Conventions are reproduced below.

If art 82 provides that one of the other Conventions take precedence, that convention applies throughout the transport. The result may be that two very similar transports are governed by different sets of rules, eg, dependent on whether the goods remain loaded on a truck at a ferry stretch or not. This is unavoidable due to the fact that the Conventions have been created at different times and under different circumstances.

It may be difficult to ascertain in advance which Convention will apply pursuant to these rules; eg, if one does not know whether the goods will be unloaded from the truck at a ferry leg. In these cases, one cannot know whether to issue a CMR consignment note or a RR transport document. The parties should in such cases act according to their best judgment.

If the RR after this is applicable, that does not exclude the application of the other Conventions entirely. The RR incorporate some of provisions of the other Conventions by its art 26. Eg, in respect of a part of the transport that is a road transport, the liability provisions of the CMR may be applicable (pursuant to specified conditions).

Rev. 3

THE CLAUSES INDIRECTLY REFERRED TO IN RR ART 82:

Convention for the unification of certain rules for international carriage by air (Montreal Convention) 1999

Article 18 Damage to Cargo

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of

¹ See in particular the Supreme Court of Germany 17 July 2008 (I ZR 181/05), the supreme Court of Belgium 8 November 2004 (C.03.0510.N/1).

a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Convention on the Contract for the International Carriage of Goods by Road (CMR) 1978

Article 2

1. Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage. Provided that to the extent it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by act or omission of the carrier by road, but by some event which could only occur in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall be determined not by this convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage of the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport. If, however, there are no such prescribed conditions, the liability of the carrier by road shall be determined by this convention.

Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM - Appendix B to the Convention) 1999

Article 1 Scope

§ 4 When international carriage being the subject of a single contract of carriage includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, these Uniform Rules shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in Article 24 § 1 of the Convention.²

Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI) 2000

Article 2 Scope of application

2. This Convention is applicable if the purpose of the contract of carriage is the carriage of goods, without transshipment, both on inland waterways and in waters to which maritime regulations apply, under the conditions set out in paragraph 1, unless:

² The list is available at <http://www.otif.org/en/publications/cim-lists-of-lines-or-services/cim-list-of-maritime-and-inland-waterway-services.html>.

- (a) A marine bill of lading has been issued in accordance with the maritime law applicable, or
- (b) The distance to be travelled in waters to which maritime regulations apply is the greater.